NO. 7781

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHARLES DEMMERT, for himself and all other Tax Payers similarly situated,

Appellant,

vs.

WALSTEIN G. SMITH, as Territorial Treasurer of the Territory of Alaska,

Appellee.

Upon Appeal from the District Court of Alaska, Division Number One, at Juneau. Hon. George F. Alexander, Judge

Brief of Appellee in Support of Judgment

JAS. S. TRUITT,
Attorney General for Alaska,
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Juneau, Alaska

SUBJECT INDEX

CODES AND STATUTES

AUTHORITIES CITED

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Brief of Appellee

BRIEF STATEMENT:

The above named plaintiff filed his bill of complaint in equity in the United States Court, above designated, praying for an Injunction to restrain the Defendant, Walstein G. Smith, as Territorial Treasurer of the Territory of Alaska, from paying out of the Territorial Treasury various sums of money appropriated by the Territorial Legislature, (Chap. 119, Session Laws of Alaska, 1933) on the ground and for the reasons stated in his said bill of complaint (Tr. pp. 2-9, incl.), to which bill of complaint, and the whole thereof, the Defendant demurred (Tr. pp. 10-11).

Without other or further reference to the fact that the present incumbent in office as Territorial Trea-

surer of the Territory of Alaska is not liable for the acts of his predecessor, Appellee above named (46 C.J. p. 1046, Sec. 331), we herewith submit our argument in support of the Judgment rendered by the District Court, above entitled.

ARGUMENT ON DEMURRER
Paragraphs One And Two

In the case at bar the defendant contends that the Territory of Alaska, though not named as such, is the real and necessary party defendant. No personal relief is sought against the Territorial Treasurer, no act of his is brought in question, and no official misconduct is charged against him. So far as he is concerned, the action is purely impersonal. It is the aim of the action to enjoin the Territorial Treasurer, in his official capacity, from paying out of the Treasury certain sums of money appropriated by the Territorial Legislature for the purposes stated in the Acts of the Legislature referred to in the plaintiff's bill of complaint (Tr. pp. 3, 4, 5). The opinion of Judge Gilbert in the case of Smith vs. Rackliffe, 87 Federal, Page 966, fairly presents our views with reference to the real party defendant in the case at bar.

TERRITORIES OF THE UNITED STATES:

Alaska is one of the Territories of the United States, assigned to the Ninth Judicial Circuit;

The Steamer Coquitlam, et al vs. United States, 163 U. S. 352, 41 L. Ed. 186.

LEGISLATIVE POWERS:

Congress may transfer the power of legislation in respect to local affairs to a legislature elected by the citizens of a Territory;

> Binns vs. United States, 194 U. S. 491, 48 L. Ed. 1089; Sere vs. Pitot, 6 Cranch, 336; Murphy vs. Ramsey, 114 U. S. 45, 29 L. Ed. 47-58.

Duly organized Territories of the United States are invested with legislative power, which extends to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States;

> R. S. Section 1851, Wilkerson Plff. in Err. vs. People of the United States in the Territory of Utah, 99 U. S. 130, 25 L. Ed. 346.

ALASKA IS AN ORGANIZED TERRITORY:

By an Act of Congress entitled, "An Act creating a legislative Assembly in the Territory of Alaska, to confer legislative power thereon, and for other purposes," approved August 24, 1912, Chapter 387, Sec. 1, 37 Stat. 512, (Sec. 21, Tit. 48, USCA) Alaska became an organized and an incorporated Territory of the United States.

The action being one to enjoin and restrain the defendant, in his official capacity, from paying out of the Treasury the various sums of money referred to in the complaint, and not an action attacking the Constitutionality of the taxing Statute under which the various sums of money were collected and paid into the Territorial Treasury, we can arrive at but

one conclusion, to wit, the real and indispensable party defendant, though not named as such, is the Territory of Alaska. It is now well established that, if an indispensable party is not joined, the suit must be dismissed;

> Transcontinental & Western Air vs. Farley, 71 Fed. (2d) 292; Gnerich vs. Rutter, 265 U. S. 393; Webster vs. Fall, 266 U. S. 510.

INCORPORATED TERRITORIES:

Duly incorporated Territories of the United States have always been held to possess an immunity from suit without their consent;

> Porto Rico vs. Rosaly Y. Castillo 227 U. S. 274, 57 L. Ed. 508.

It has been decided that the Government created for Alaska is of such a character as to give it immunity from suit without its consent;

> Pacific American Fisheries vs. Territory of Alaska, 7 Alaska, 147-150.

ACTIONS AGAINST TERRITORIES:

The incorporated Territories of the United States have always been held to possess an immunity from suit without their consent, and though a Territory is not an integral part of the United States the same rule should apply;

> 26 R.C.L. 688, Sec. 30, Citing Porto Rico vs. Rosaly Y. Castillo, 227 U. S. 270, 273, 274, 57 L. Ed. 508, 509, (Stating the rule) To same point, 62 C.J. 819, 820, Sec. 37.

The defendant's demurrer is based on the fact that the complaint shows on its face that the action is, in fact, against the Territory of Alaska, and the Territory has not consented to be sued in respect to the subject matter;

> Pacific American Fisheries vs. Territory of Alaska, 7 Alaska 148; Citing Kawananakoa vs. Polyblank, 205 U. S. 349, 51 L. Ed. 834.

As to what is to be deemed a suit against a state, the early suggestion that the inhibition might be confined to those in which the state was a party to the record (Osborn vs. Bank of United States, 9 Wheat. 738, 846, 850, 857, 6 L. Ed. 204, 229, 231, 232) has long since been abandoned, and it is now established that the question is to be determined not by the mere names of the titular parties but by the essential nature and effect of the proceedings, as appears from the record;

> In re the State of N.Y. Edward S. Walsh, Supt., etc., et al, 256 U. S. 500, 65 L. Ed. 1062; Smith vs. Reeves, 178 U. S. 436, Syl. 1, 440, 44 L. Ed. 1143; Ex Parte Ayers, 123 U. S. 443, 31 L. Ed. 216; Cunningham vs. Macon, 109 U. S. 446, 27 L. Ed. 992; Automobile Abstract and Title Co. vs. Haggerty, 46 Fed. (2d) 86; Lowenstein vs. Evans, 69 Fed. 908; Brown University vs. Rhode Island Agr. College, 56 Fed. 55; McClellan vs. State, 170 Pac. 662; Garden City Ginn Co. vs. Nation, 109 Pac. 772; State vs. Toole, 66 Pac. 496; Love vs. Filtsche, 124 Pac. 30.

It is elementary that the state or sovereign cannot be sued in its own courts without its consent;

Beers vs. Arkansas, 20 How. 527-530, Syl. 1, 15 L. Ed. 991-992; Memphis N.C.R. Co. vs. Tenn. 101 U. S. 333-339; Biscoe vs. Bank of Commonwealth, 11 Pet. 257, 9 L. Ed. 709; Lowenstein vs. Evans, 69 Fed. 908.

Government, state or National, cannot be sued in its own courts or in any other without its consent and permission by law;

Cohens vs. Virginia, 6 Wheat. 264, 380, 392; U. S. vs. Clark, 8 Pet. 436, 444; Carry vs. Curtis, 3 How. 236; Hill vs. United States, 9 How. 386, 389; Reeside vs. Walker, 11 How. 272, 290.

This rule is equally applicable to the organized Territories of the United States;

Territory vs. Doty, 1 Pinney (Wis.) 405; Langford vs. King, 1 Mont. 38; Fisk vs. Cuthbert, 2 Mont. 598.

The court will look behind and through nominal parties to the record to ascertain the real party and will deny relief if it appears that the state is an indispensable party, unless it submits to jurisdiction;

Mohler Et Ux vs. Fish Commission of State of Oregon, 276 Pac. 691, Syl. 3, 692.

ALASKA IMMUNE FROM SUIT WITHOUT ITS PERMISSION:

"A Sovereign is exempt from suit not because of any formal conception or obsolete theory but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends. The Territory itself is the fountain from which rights ordinarily flow. It

is true that Congress might intervene just as in the case of a state the Constitution does, and the power that can alter the Constitution might. But the rights that exist are not created by a Congress or the Constitution, except to the extent of certain limitations of powers;"

Kawananakoa vs. Polyblank, 205 U. S. 349, 355, 354, 51 L. Ed. 834.

The construction of a Territorial statute by the local courts is of great if not controlling weight;

Lewis vs. Herrera, 208 U. S. 309, 314.

The Federal Supreme Court accepts the construction which a Territorial Court has placed upon a local statute; that is, it will not disregard or reverse the same unless constrained to do so by the clearest conviction of serious error;

Work vs. The United Globe Mines, 231 U. S. 595, 599.

Courts generally view the statutes of a Territorial legislature as they do state laws—they are limited only by the Federal Constitution and applicable Federal laws:

"As a general thing subject to the general scheme of local government chalked out by the Organic Act, and such special provisions as are contained therein, the local legislature has been entrusted with the enactment of the entire system of municipal law, subject also, to the right of Congress, to revise, alter and revoke at its discretion. The powers thus exercised by the Territorial Legislature are nearly as extensive

as those exercised by any state legislature;"

Hornbuckle vs. Toombs, 18 Wall. 657, 21 L. Ed. 968; 26 R.C.L. Sec. 25, 683.

The general rule that a state cannot be sued without its consent cannot be evaded by making an act nominally one against the servants or agents of the state when the real claim is against the state itself and it is the party vitally interested;

Wilson vs. La. Purchase Exposition Commission, 110 N.W. 1045, 1046; Edward S. Walsh, Supt. 256, U. S. 500.

It is now settled that the jurdisdiction in such cases is dependent upon the real and not upon the nominal parties to the suit, and it is now claimed, both upon principles and authority, that a suit against the officers of a state is in fact and legal effect against the state, though the state itself is not named a party on the record;

Hagwood vs. Southern, 117 U. S. 52, 67.

Equity will not interfere to enjoin a public officer from doing an act which the law requires him to perform merely because it may result in a peculiar hardship in a particlar instance;

Southern Ore. Co. vs. Gage, 149 Pac. 272.

The treasurer of a state is not a trustee of monies in the state treasury. He holds them only as the agent of the state. If there is any trust the state is the trustee and unless it can be sued the trustee can not be enjoined;

La. on the relation of John Elliott, et al, vs. Allen Jumel, Auditor of State, et al, 107 U. S. 711, 713 (27 L. Ed. 448, Esp. 452).

Duly organized and incorporated territories of the United States are not municipal corporations;

Dillon on Municipal Corporations, 4 Ed. Vol. 1, Secs. 38, 56; Coffiele vs. Terr. 13 Haw. 479.

The grant of legislative power in all acts organizing territories extends to all rightful subjects of legislation;

Maynard vs. Hill, 125 U. S. 190, 204, 31 L. Ed. 657.

As a general rule the legislature of a territory has been entrusted with power, co-extensive with that of the states, to enact a system of municipal law, subject to its Organic Act and the right of Congress to revise, alter, or repeal;

Hornbuckle vs. Toombs, 18 Wall. 659, 21 L. Ed. 968.

A suit to restrain officers of a state from taking any steps, by means of judicial procedure, in execution of a state's statute to which they do not hold any special relation, is really a suit against the state within the prohibition of the Eleventh Amendment of the Federal Constitution;

Fitts vs. McGhee, 172 U. S. 516, 525, 526.

In making an officer of the suit a party defendent in the suit to enjoin the enforcement of an act alleged to be unconstitutional, such officer must have some connection with the enforcement of the act arising

out of the general law or specially created by the Act itself, or else it is merely making him a party as the representative of the state, and thereby attempting to make the state a party;

Ex Parte Young, 209 U. S. 123, 157, 52 L. Ed. 728.

Where a state is not only the real party to the controversy, but the real party against which relief is sought, the nominal defendants being its officers and agents, without any personal interest in the subject matter, the suit is substantially within the prohibition of the Eleventh Amendment;

Hagwood vs. Southern, 117 U. S. 52, Syl. 3, 67-71, 29 L. Ed. 810, 811.

Money in the treasury of a state raised by taxation is the legal property of the state, and if there is any trust attaching to it, arising from the purposes for which it was raised, the state, and not the treasurer, is the trustee; and no mandamus or other remedy can reach the state except against the state as a party;

Louisiana ex rel. Elliott vs. Jumel, 107 U. S. 711, Syl. 1, 3, 4, 27 L. Ed. 448.

Courts have no authority when a state cannot be sued to set up jurisdiction of officers in charge of public monies, so as to control them, as against the political power, in the administration of the finances of the state;

Elliott vs. Jumel, 107 U. S. 711, Supra.

When it appears that a state is an indispensable party to enable a Federal court to grant relief sought

by private parties, and the state has not consented to be sued, the court will refuse to take jurisdiction;

> Missouri vs. Fiske, 290 U. S. 18, 28; Cunningham vs. Macon & Brunswick R. Co. 109 U. S. 446, 451, 457; In re Ayers, 123 U. S. 443, Syl. 4, 5, 6 and p. 489; Christian vs. Atlantic & N.C.R. Co. 133 U. S. 223, 224; Stanley vs. Schwalby, 147 U. S. 508, 518; So. Carolina vs. Wesley, 155 U. S. 542, 545; Belknap vs. Schild, 161 U. S. 10, 20.

Whether a suit is within the prohibition of the Eleventh Amendment is not always determined by reference to the nominal parties on the record, but by a consideration of the nature of the case;

> Syl. 4, Ex Parte Ayers, 123 U. S. 443, 31 L. Ed. 216.

In such a case, though the state be not nominally a party on the record, if the defendants are its officers and agents, through whom alone it can act in doing and refusing to do the things which constitute a breach of its contract, the suit is still in substance, though not in form, a suit against the state;

> Syl. 6, Ex Parte Ayers, Supra.

The legal title to public monies in the hands of the state treasurer or other officer entitled to the custody thereof is in the state and not in such officer;

> State vs. McFetridge, 54 N.W. 14, 15. Motion for rehearing denied, 54 N.W. 998.

PARTICULAR STATUTES ATTACKED:

Plaintiff alleges in his complaint that Sections 26, Chapter 65, S.L.A. 1929, as amended by Chapter 89,

S.L.A. 1933, same being Sec. 1821, C.L.A. 1933, and Sec. 28, Chap. 65, S.L.A. 1929, same being Sec. 1823, C.L.A. 1933 (Tr. 5, 6, 7) to be unconstitutional on the ground that such statutes discriminate against the native Indians, residents of Alaska, from which we conclude his action not that of a tax payer, but as a champion of the native Indians, Eskimos and Aleuts, residents of Alaska.

In order to subject a territorial statute to the annulling clause of an Act of Congress, the conflict should be direct and unmistakable. No law will be declared void because it may indirectly, or by a possible and not a necessary construction, be repugnant to annulling act;

Cope vs. Cope, 137 U. S. 686.

A statute will not be declared void unless its invalidity is distinctly pointed out and clearly shown, and therefore one who alleges that a statute is unconstitutional must point out the specific constitutional provision that is violated by it;

12 C.J. 785, Sec. 216; Talcott vs. Pinegrove, 23 Fed. Case No. 13, 735, 22 L. Ed. 277, 232, Ex Parte Anderson, 123 Pacific, 972; Crowley vs. State, 6 Pacific, 70.

An allegation that one section of a statute is unconstitutional on specific ground does not raise the question of the invalidity of another section on such ground;

Roberts vs. Evanston, 75 Northeastern, 923.

The constitutionality of a statute on the ground

that it denies equal rights and privileges by discriminating between persons or classes of persons may not be raised by one not belonging to the class alleged to be discriminated against. This has been held in numerous cases and the rule applies to all cases affecting civil rights of every kind, and also to cases where property rights only are effected;

12 C. J. Sec. 189, p. 768.

In taxpayer's actions to test the constitutionality of a statute, only such questions will be considered as bear on its validity as a whole;

State vs. Eberhardt, 147 Northwestern, 1016.

The constitutionality of a statute cannot be assailed without showing that the party questioning it has been or is likely to be deprived of his property without due process of law; a court cannot assume to decide the general question whether the statute as to some other person amounts to a deprivation of property;

Tyler vs. Judges, 179 U. S. 410.

"One who would strike down a state statute as violative of the Federal Constitution must bring himself by proper averments and showing within the class as to whom the act thus attacked is unconstitutional. He must show that the alleged unconstitutional feature of the law injures him, and so operates to deprive him of rights protected by the Federal Constitution;"

Standard Stock Food Co. vs. Wright, as State and Dairy Commissioner, 225 U. S. 540, Syl. 4, 56 L. Ed. 1197, Syl. 4, p. 1201.

DEMURRER—PARAGRAPH THREE

Plaintiff has no capacity to sue; he fails to bring himself within the class alleged to be discriminated against, therefore, the averments in plaintiff's complaint are mere conclusions. They set forth no facts which would make the operation of the statute unconstitutional;

> Southern R. Co. vs. King, 217 U. S. 524, 534, 54 L. Ed. 868, 873; Chitty Pl. 1, Cited in Tyler vs. Judges Court of Registration, 179 U. S. 405, 407, 45 L. Ed.

The word Capacity has a definite meaning: "Ability, power, qualification, or competency of persons, natural or artificial, for the performance of civil acts depending on their state or condition as defined or fixed by law;"

> Bouvier's Law Dictionary, 1934 Ed.

The unconstitutionality of a statute on the ground that it denies equal rights and privileges by discriminating between persons or classes of persons may not be raised by one not belonging to the class alleged to be discriminated against;

> Hendrick vs. Maryland, 235 U. S. 610, 621; New York ex rel Hatch vs. Reardon, 204 U. S. 152, 161, 160; Williams vs. Walsh, 222 U. S. 415, 423; Collins vs. Texas, 223 U. S. 288, 295, 296; M.K.&T.R. Co. vs. Cade, 233 U. S. 642, 648, 650; Murphy vs. California, 225 U. S. 630, 631.

The objection that a statute regulating the distribution of money for school purposes discriminates

against Negroes cannot be raised by a white person;

Reid vs. Eatonton, 6 S.E. 602;
Norman vs. Boaz, 4 S. W. 316;
Eakins vs. Eakins, 20 S.W. 285.

The objection that a statute is unconstitutional because discriminatory can only be taken by the person discriminated against, or adversely affected;

Albany County vs. Stanley, 105 U. S. 305, 26 L. Ed. 1044; Clark vs. Kansas City, 176 U. S. 114, 44 L. Ed. 392; Chadwick vs. Kelley, 187 U. S. 540, 47 L. Ed. 293; Cronin vs. Admas, 192 U. S. 108, 28 L. Ed. 365; Brown vs. Ohio Valley R. Co. 79 Fed. 176.

A person who is seeking to raise the question as to the validity of a discriminatory statute has no standing for that purpose unless he belongs to the class which is prejudiced by the statute;

6 R.C.L. Par. 89, p. 91—Citing Iroquois Transp. Co. vs. DeLaney, Forge & Iron Co. 205 U. S. 354, 51 L. Ed. 836; Fidelity & Casualty Co. of New York vs. Freeman, 109 Fed. 847; Lee vs. State of New Jersey, 207 U. S. 67, 52 L. Ed. 106.

"A member of a particular class which may be discriminated against does not necessarily have the right to champion any grievance of that entire class in the absence of any actual interest which is prejudiced or impaired by the statute in question. * * * On the same principle a white person cannot raise the question whether the exclusion of Negroes from participating in the benefits of the common school system of the state is or is not in violation of the state

constitution;"

6 R.C.L. Sec. 90, p. 91-Citing Commonwealth vs. Wright, 42 Amer. Rept. 203.

The provisions of Sec. 26, Chap. 65, S.L.A. 1929, as amended by Chap. 89, S.L.A. 1933 (Sec. 1821, C.L.-A. 1933) are directory, and qualifies, to some extent, the provisions of Sec. 28, Chap. 65, S.L.A. 1929 (Sec. 1823, C.L.A. 1933) by authorizing the Governor of Alaska to hear and pass upon the eligibility of all applications of dependents for relief under the laws of Alaska. Section 8, Chap. 46, S.L.A. 1923 referred to in Paragraph 4 of the plaintiff's complaint has no application to the case at bar, and furthermore was repealed by said Chapter 65, S.L.A. 1929.

The court has the right to assume that the Territorial Legislature in the enactment of the statutes above referred to duly considered the relationship of guardian and ward now existing, and has existed since March 30, 1867 between the Federal Government and the native Indian and Eskimo peoples of the Territory of Alaska. The fact that the Territory of Alaska has permitted certain natives the right of suffrage under the provisions of Sec. 57, Title 48, USCA, Sec. 1451, CLA 1933, does not alter their relations to the United States;

U. S. vs. Rickert, 188 U. S. 432, 445, 47 L. Ed. 539.

Citizenship is not in itself an obstacle to the exercise by Congress of its powers to enact laws for the benefit and protection of the Indians as a dependent

people;

U. S. vs. Celestine, 215 U. S. 278, 289, 54 L. Ed. 195; Tiger vs. Western Inv. Co. 221 U. S. 286 Syl. 55 L. Ed. 738; Hallowell vs. U. S. 221 U. S. 317, 323, 55 L. Ed. 750; U. S. vs. Sandoval, 231 U. S. 28 Syl. 58 L. Ed. 107; Bowling vs. U. S. 233 U. S. 528 Syl. 58 L. Ed. 1080.

WARDS OF FEDERAL GOVERNMENT

In the case of Winton V. Amos, 255 U. S. 373, 391, 392, 65 L. Ed. 684, Mr. Justice Pitney delivered the opinion of the Court and holds: "It is thoroughly established that Congress has plenary authority over the Indians and all their tribal relations, and full power to legislate concerning their tribal property. The guardianship arises from their condition of tutelage or dependency, and it rests with Congress to determine when the relationship shall cease; the mere grant of citizenship not being sufficient to terminate it."

Indian Tribes are the wards of the Nation, Lone Wolf vs. Hitchcock, 187 U. S. 567.

The Indians, Eskimos, Aleuts, and other natives of Alaska are the wards of the United States and as such are by Federal appropriations annually provided for.

OFFICIAL STATEMENT AS TO LEGAL STATUS OF ALASKA NATIVES, Approved by the Secretary of the Interior, February 24, 1932, hereto attached as an Appendix to this brief.

BURDEN
ESTABLISHING UNCONSTITUTIONALITY

In the case of the Metropolitan Casualty Insurance Company vs. Brownell, 294 U. S. 584, 79 L. Ed. 566, Mr. Justice Stone delivered the opinion of the Court and stated: "It is a salutary principle of judicial decision, long emphasized and followed by this Court, that the burden of establishing the unconstitutionality of a statute rests on him who assails it, and that courts may not declare a legislative discrimination invalid unless, viewed in the light of facts made known or generally assumed, it is of such a character as to preclude the assumption that the classification rests upon some rational basis within the knowledge and experience of the legislators." Citing cases.

A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it;

> Rast vs. Van Deman and L. Co. 240 U. S. 342; State Tax Com'rs. vs. Jackson, 283 U. S. 527, 537.

"There is a strong presumption that a legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds. The equal protection clause does not require that state laws shall cover the entire field of proper legislation in a single enactment. If one entertained the view that the act might as well have been extended to other classes of

employment, this would not amount to a constitutional objection;"

> Middleton vs. Texas Power & L. Co. 249 U. S. 152, 157, 158, 63 L. Ed. 527, 531—Cases cited.

The clause in the 14th Amendment forbidding a state to deny to any person within its jurisdiction the equal protection of the laws does not prevent a state from adjusting its legislation to differences in situation, or forbid classification in that connection; but it does require that the classification be not arbitrary but based on a real and substantial difference having a reasonable relation to the subject of the particular legislation;

> Power Mfg. Co. vs. Harvey Saunders 274 U. S. 493, 71 L. Ed. 1168 to same point Quaker City Cab Co. vs. Pennsylvania, 277 U. S. 400, 72 L. Ed. 929.

Above quoted with approval in the case of Joseph Triner Corp. vs. Arundel, 11 Fed. Supp. 147.

The burden being upon him who attacks a law for unconstitutionality, the courts need not be ingenious in searching for grounds of distinction to sustain a classification that may be subjected to criticism;

> Middleton vs. Texas Power & L. Co. 249 U. S. 152, 158, 63 L. Ed. 531.

RE: DISCRIMINATION

There are no averments of any facts in the plaintiff's complaint which warrant a conclusion that the plaintiff individually is being discriminated against

at all;

Lipson vs. Scony-Vacuum Corp. 76 Fed. (2d) 217.

TERRITORIAL TREASURER:

Section 3188, Compiled Laws of Alaska 1933, designates the duties and responsibilities of the Territorial Treasurer with reference to Territorial funds collected by him, and specifically provides all such funds to be the property of the Territory of Alaska.

INJUNCTION

The function of an injunction is to afford preventive relief, and not to redress wrongs already committed;

Lacassagne vs. Chapuis, 144 U. S. 119, 36 L. Ed. 368; Industrial Ass'n. vs. U. S. 268 U. S. 64, 69 L. Ed. 849; Boggus Motor Co. vs. Onderdonk, 9 Fed. Supp. 959.

Control of Executive Officers by Mandamus or Injunction

The Territorial Treasurer is an Executive Officer. Sec. 4879, C.L.A. 1933.

The judiciary cannot properly interfere with executive action when the executive officer is authorized to exercise his judgment or discretion;

Dudley vs. James, 83 Fed. 345; Gaines vs. Thompson, 7 Wall. 347.

"But no injunction can be issued against officers of a state, to restrain or control the use of property

already in the possession of the state, or money in its treasury when the suit is commenced; or to compel the state to perform its obligations; or where the state has otherwise such an interest in the object of the suit as to be a necessary party. Similarly where injunction proceedings although nominally against public officers are in reality against the United States, the Court will not grant the relief requested;"

22 R.C.L. Sec. 173, p. 494; McGahey vs. Virginia, 132 U. S. 662, 34 L. Ed. 304; Pennoyer vs. McConnaughy, 140 U. S. 1, 35 L. Ed. 363; Belknap vs. Schild, 161 U. S. 10, 40 L. Ed. 599.

STATUTORY CONSTRUCTION

The Right to Incorporate in General

Except where there is some constitutional inhibition against it, the provisions of one act may be made applicable to another by a reference to the former in the latter, which may be effected by reference to particular sections of the former act that are to be incorporated, or by a general reference to the whole act or body of statutes or laws concerning a particular subject, in so far as the provisions are applicable, or not conflicting;

59 C.J. Secs. 167, 168, p. 610, 611.

The adoption of an earlier statute by reference makes it as much a part of the latter as though it had been incorporated in full length;

Engel vs. Davenport, 271 U. S. 38, 70 L. Ed. 1181, 1221; Re Heath, 144 U. S. 92, 94, 36 L. Ed. 358, 359.

"The adoption of the earlier act brings into the latter act all that is fairly covered by the reference;"

Panama R.R. Co. Case 264 U. S. 392, 68 L. Ed. 755;

holding all the provisions of the former act which from the nature of the subject matter are applicable to the latter act.

An adoption of an existing statute by an act of the legislature, which refers generally to the law relating to the subject, will include not only the law in force at the date of the adopting act, but also such amendments of the law as are in force when action is taken or a proceeding is resorted to under such law;

People vs. Kramer, 160 N.E. 60.

Burden of proof, where constitutionality of a statute is in question, is always upon the party asserting unconstitutionality since presumption obtains that legislature knows its constitutional limitations of power and has not exceeded them;

City of Louisville vs. Babb, 75 Fed. (2d) 162, Syl. 4. Cert. den. 55 S. CT. 650.

In case of doubt statute should be so construed so as to uphold its validity;

Louisville Joint Stock Land Bank vs. Radford, 74 Fed. (2d) 576.

A discriminatory statute will not be overthrown by courts unless palpably arbitrary;

Bayside Fish Flour Co. vs. Gentry, 8 Fed. Supp. 67.

Acts should be declared void only when incompatability between it and Constitution is clearly apparent;

In re Oetman, 9 Fed. Supp. 575.

Courts may not ignore executive interpretation of statute;

American Exchange Sec. Corp. vs. Helvering, 74 Fed. (2d) 213.

Construction of statute by governmental department charged with its execution should not be overruled without cogent reasons;

City of Tulsa vs. Southwestern Bell Telephone Co. 75 Fed. (2d) 343.

Interpretations of law by those charged with its enforcement are generally of great weight;

Brebham vs. Cooper, 9 Fed. Supp. 904.

Injunction does not lie merely because an act is unconstitutional, but one must further show some clear ground of equity jurisdiction;

Richmond Hosiery Mills vs. Camp 74 Fed. (2d) 200.

DEMURRER—PARAGRAPH FOUR

Plaintiff's failure to allege facts sufficient to give the Court jurisdiction over the person of the defendant or the subject of the action, and failure to allege facts showing plaintiff's legal capacity to sue, leads us to the conclusion that the complaint does not state facts sufficient to constitute a cause of action or to entitle plaintiff to any relief in his complaint de-

manded—An objection never waived under Alaska practice (Kohn vs. McKinnon, 90 Fed. 624).

Respectfully submitted,

JAS. S. TRUITT
Attorney General for Alaska,
Juneau, Alaska

APPENDIX

Opinion approved February 24, 1932, by Ray Lyman Wilbur, Secretary of the Interior:

"The Honorable
The Secretary of the Interior
Dear Mr. Secretary:

You have requested my opinion on the legal status of the natives of Alaska—Eskimos, Aleuts, Indians, et al.

Alaska was ceded to the United States by Russia under the treaty of March 30, 1867 (15 Stat. 539). Article III of the treaty provides:

> 'The inhabitants of the ceded territory, ... if they should prefer to remain in the ceded territory, they, with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property, and religion. The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country.'

An opinion by the Solicitor of this Department

under date of May 18, 1925 (49 L.D. 592), sets forth the following:

> 'In the beginning, and for a long time after the cession of this Territory Congress took no particular notice of these natives; has never undertaken to hamper their individual movements; confine them to a locality or reservation, or to place them under the immediate control of its officers, as has been the case with the American Indians; and no special provision was made for their support and education until comparatively recently. And in the earlier days it was repeatedly held by the courts and the Attorney General that these natives did not bear the same relation to our government, in many respects, that was borne by the American Indians.' (16 Ops. Atty. Gen. 141; 18 id., 139); United States v. Ferueta Seveloff (2 Sawyer U. S. 311); Hugh Waters v. James B. Campbell (4 Sawyer U. S. 121); John Brady et al. (19 L.D. 323).

With the exception of the act of March 3, 1891 (26 Stat. 1095, 1101), which set apart the Annette Islands as a reservation for the use of the Metlakahtlans, a band of British Columbian natives who immigrated into Alaska in a body, and also except the authorization given to the Secretary of the Interior to make reservations for landing places for the canoes and boats of the natives, Congress has not created or directly authorized the creation of reservations of any other character for them.

Later, however, Congress began to directly recognize these natives, as being, to a very considerable extent at least, under our Government's guardianship and enacted laws which protected them in the pos-

session of the lands they occupied; made provision for the allotment of lands to them in severalty, similar to those made to the American Indians; gave them special hunting, fishing and other particular privileges to enable them to support themselves, and supplied them with reindeer and instructions as to their propagation. Congress has also supplied funds to give these natives medical and hospital treatment and finally made and is still making extensive appropriations to defray the expenses of both their education and their support.

Not only has Congress in this manner treated these natives as being wards of the Government but they have been repeatedly so recognized by the courts. See Alaska Pacific Fisheries v. United States (248 U. S. 78); United States v. Berrigan et al. (2 Alaska Reports, 442); United States v. Cadzow et al. (5 id. 125), and the unpublished decision of the District Court of Alaska, Division No. 1, in the case of Territory of Alaska v. Annette Islands Packing Company et al., rendered June 15, 1922.

From this it will be seen that these natives are now unquestionably considered and treated as being under the guardianship and protection of the Federal Government, at least to such an extent as to bring them within the spirit, if not within the exact letter, of the laws relative to American Indians; and this conclusion is supported by the fact that in creating the territorial government of Alaska and vesting that territory with the powers of legislation and control

over its internal affairs, including public schools, Congress expressly excluded from that legislation and control the schools maintained for the natives and declared that such schools should continue to remain under the control of the Secretary of the Interior.

Any change that may have occurred in the original attitude of the United States towards the natives of Alaska is reflected in subsequent acts of Congress which were invariably intended to be in their interest and for their benefit, no distinction being made as to any particular natives.

Some disposition has been shown to make a distinction between the Indians of Alaska and other natives, particularly the Eskimos. It has been asserted by ethnologists that the Eskimos are not of Indian but more likely are of Manchurian and Chinese origin. After the Indians, the Eskimos of Alaska are probably the most advanced of the natives and for this reason these two races are best known and are more frequently referred to than the other natives such as the Aleuts, Athapascans, Tlinkets, Hydahs and other natives of indigenous race inhabiting the Territory of Alaska. The Eskimos are said to know nothing of their early predecessors. The origin of the natives of Alaska will possibly some day become known, but whether that comes to pass or not the fact is that they are all wards of the Nation and are treated in material respects the same as are the aboriginal tribes of the United States.

The act of March 3, 1899 (30 Stat. 1253), defining the penal and criminal laws of the United States relating to the District of Alaska provides in section 142 of Chap. 8 thereof, in the matter of selling liquor or firearms to Indians, as follows:

> 'The term 'Indian' in this Act shall be so construed as to include the aboriginal races inhabiting Alaska when annexed to the United States, and their descendants of the whole or half blood.'

The above provision was amended by the act of February 6, 1909 (600, 603), by adding after the words "half blood"—'who have not become citizens of the United States.' This provision loses whatever significance it may have had if the act of June 2, 1924 (43 Stat. 253), declaring 'all non-citizen Indians born within the territorial limits of the United States' to be citizens of the United States, is applicable to the natives of Alaska.

In the case of United States v. Lynch (7 Alaska Reports 468, 572), referring to article III of the treaty of cession between Russia and the United States, the court held:

> 'Under this treaty the Tlinket tribe became subject to such rules and regulations as the United States may thereafter adopt as to the native Indians of the United States. Therefore, by the provisions of the treaty, the Indians of the Tlinket tribe became citizens of the United States, in common with the native Indian tribes of the United States, under the Act of June 2, 1924 (8 USCA Sec. 3), which provided that all non-citizen Indians, born within the territorial limits of the United States, shall be citizens, and that

> the granting of citizenship shall not, in any manner, impair or otherwise affect the right of any Indian to tribal or other property.'

Demurrer in the Lynch case was overruled. (7 Alaska Reports 643); see also case of Rasmussen v. United States (197 U. S. 516).

As Indians of Alaska are within the category of natives of Alaska and as the term 'Indian' is to be so construed as to include the aboriginal races inhabiting Alaska, the ruling of the court in the Lynch case would seem to be equally applicable to all other natives of that Territory.

Reference to the provisions of certain acts will give a definite idea of the extent to which the natives of Alaska have been recognized by the Congress as well as show the similarity of their treatment to that accorded the Indians of the United States. In the first place, the treaty between Russia and the United States after providing that the civilized native tribes 'shall be admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States and shall be maintained and protected in the free enjoyment of their liberty, property and religion,' further provides:

> 'The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country.'

The Indians, Eskimos, Aleuts and other natives of Alaska are therefore the wards of the Nation the same as are the Indians inhabiting the States. In re

Sah Quah (31 Fed. 327), wherein it was held:

> 'The United States has at no time recognized any tribal independence or relations among these Indians, has never treated with them in any capacity, but from every act of Congress in relation to the people of this territory it is clearly inferable that they have been and now are regarded as dependent subjects, amenable to the penal laws of the United States, and subject to the jurisdiction of its courts . . . . They are practically in a state of pupilage, and sustain a relation to the United States similar to that of a ward to a guardian, . . . '

In section 13 of the act of May 17, 1884 (23 Stat. 24, 27), entitled 'An Act providing a civil Government for Alaska' the Secretary of the Interior is authorized to make needful and proper provision for the education of the children of school age in the Territory of Alaska 'without reference to race, until such time as permanent provisions shall be made for the same.'

A similar provision is contained in the act of June 6, 1900 (31 Stat. 321, 330). This act was amended by the act of March 3, 1901 (31 Stat. 1438), by providing that 50 per cent of all license money collected on business carried on outside incorporated towns in the District of Alaska should be used by the Secretary of the Interior in his discretion and under his direction for the support of schools outside incorporated towns. All schools were supported by annual appropriations made by Congress up to June 30, 1901. Thereafter, all schools outside incorporated towns remained under the supervision of the Secretary of the

Interior and were supported by the license money referred to, until January 27, 1905.

The act of January 27, 1905 (33 Stat. 616), entitled 'An Act to provide for the construction and maintenance of roads, the establishment and maintenance of schools, and the care and support of insane persons in the District of Alaska and for other purposes' provided in section 7 thereof as follows:

> 'That the schools specified and provided for in this Act shall be devoted to the education of white children and children of mixed blood who lead a civilized life. The education of the Eskimos and Indians in the district of Alaska shall remain under the direction and control of the Secretary of the Interior and schools for and among the Eskimos and Indians of Alaska shall be provided for by an annual appropriation, and the Eskimo and Indian children of Alaska shall have the same right to be admitted to any Indian boarding school as the Indian children in the States or Territories of the United States.'

The act of March 30, 1905 (33 Stat. 1156, 1188), made an appropriation:

> 'To enable the Secretary of the Interior, in his discretion and under his direction, to provide for the education and support of the Eskimos, Indians, and other natives of Alaska; for erection, repair, and rental of school buildings; for text-books and industrial apparatus; for pay and necessary traveling expenses of general agent, assistant agent, superintendents, teachers, physicians, and other employees, and all other necessary miscellaneous expenses which are not included under the above special heads, fifty thousand dollars, to be immediately available.'

The appropriation made by act of June 30, 1906 (34 Stat. 697, 729) for $100,000 was 'to enable the Secretary of the Interior in his discretion and under his direction, to provide for the education and support of the Eskimos, Aleuts, Indians and other natives of Alaska.'

Appropriations in increased amounts have since been made by Congress annually for the support of schools among the Eskimos, Aleuts, Indians and other natives of Alaska, the amount appropriated for that purpose for the fiscal year ending June 30, 1920, being $250,000. The act of May 27, 1908 (35 Stat. 317, 351) contains this additional provision:

> 'That all expenditure of money appropriated herein for school purposes in Alaska shall be under the supervision and direction of the Commissioner of Education and in conformity with such conditions, rules and regulations as to conduct and methods of instruction and expenditure of money as may from time to time be recommended by him and approved by the Secretary of the Interior.'

All subsequent acts making appropriations for the support of schools among the natives of Alaska contain a like provision to the above.

The Territory of Alaska was created by the act of August 24, 1912 (37 Stat. 512) and it is provided in section 3 thereof that the authority granted therein to the legislature to alter, amend, modify, and repeal laws in force in Alaska, shall not extend to the act of January 27, 1905, supra, and the several acts

amendatory thereof, which act provides that schools for and among the Eskimos and Indians of Alaska shall be provided for by an annual appropriation.

Section 416 of the Compiled Laws of Alaska provides: 'The legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States.'

The act of March 3, 1917 (39 Stat. 1131), reads as follows:

> 'That the Legislature of Alaska is hereby empowered to establish and maintain schools for white and colored children and children of mixed blood who lead a civilized life in said territory and to make appropriations of Territorial funds for that purpose; and all laws or parts of laws in conflict with this Act are to that extent repealed.'

Until that act was passed, as hereinbefore shown, the matter of schools for the children named therein was controlled by congressional legislation.

In later acts, notably that of May 24, 1922 (42 Stat. 552, 583), Congress went further and made and is still making appropriations 'To enable the Secretary of the Interior, in his discretion and under his direction, to provide for the education and support of the Eskimos, Aleuts, Indians and other natives of Alaska.'

Two things are apparent from the foregoing, namely that the Indians and other natives of Alaska are as truly the wards of the Nation as are the abor-

igines and their descendants inhabiting the States with whom the Government has had to deal since its organization; and that Congress has assumed full cost for all educational facilities among the Alaskan natives. Under the act of March 3, 1917, supra, separate schools are in existence in Alaska, that is those for the education of white and colored children and 'children of mixed blood who lead a civilized life,' established and maintained by appropriations from territorial funds; and those for the education of Eskimos, Aleuts, Indians, and other natives provided for by the annual appropriations of Congress.

The Solicitor for this Department has held that the Territory of Alaska can not legally collect from Eskimos, Aleuts, and other natives of Alaska of full blood nor of those natives of mixed blood who do not lead a civilized life, the school tax imposed by the territorial act. The case of Davis v. Sitka School Board (3 Alaska Reports 481), involved a construction of the act of January 27, 1905, supra, particularly that provision relating to 'children of mixed blood who lead a civilized life.' The court held that

> 'While the Davis children are of 'mixed blood,' they do not 'lead a civilized life,' within the meaning of section 7 of the act of Congress of January 27, 1905 (33 Stat. 617, c. 277), so as to entitle them to attend the public schools maintained for 'white children and children of mixed blood who lead a civilized life.' Held, that mandamus will not lie to compel the school board of Sitka to admit such children to the public schools therein; it appearing that the Government main-

tained a separate school for Eskimos and Indians 'under the direction and control of the Secretary of the Interior.'

In the case of United States v. Berrigan (2 Alaska Reports 442), referring to the clause of the third article of the treaty of 1867 between Russia and the United States that 'the uncivilized tribes (in Alaska) will be subject to such laws and regulations as the United States may from time to time adopt in regard to aboriginal tribes of that country,' it was held:

> 'That the Athapascan stock, including the native bands of the Tanana, belong to the uncivilized tribes mentioned in this clause. As such they are entitled to the equal protection of the laws which the United States affords to similar aboriginal tribes within its borders.'

Also that—

> 'All the vacant and unappropriated lands in Alaska at the date of the cession of 1867 by Russia became a part of the public domain and public lands of the United States.'

And further that—

> 'The uncivilized native tribes of Alaska are wards of the Government. The United States has the right, and it is its duty to protect the property rights of its Indian wards.'

In the case of Nagle v. United States (191 Fed. 141), after referring to the act of May 17, 1884, supra, providing a civil government for Alaska, and to section 1891 of the United States Revised Statutes which provide that 'The Constitution and all laws of the United States which are not locally inapplicable,

shall have the same force and effect within all the organized territories, and in every territory hereafter organized as elsewhere within the United States,' the court held 'all laws of Congress of general application not locally inapplicable are in effect in Alaska.' The court further held:

> 'The provision of Act Feb. 8, 1887, c. 119, sec. 6, 24 Stat. 390, relating to allotments of lands to Indians in severalty, that 'every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges and immunities of such citizen,' is in effect in Alaska, and operates to make Indians therein who are descendants of the aboriginal tribes, born since the annexation of Alaska, but who have voluntarily taken up their residence separate and apart from any tribe and adopted the habits of civilization, citizens of the United States, and the sale of liquor to such an Indian does not constitute an offense under Alaska Code Cr. Proc. Sec. 142 as amended by Act Feb. 6, 1909, c. 80, sec. 9, 35 Stat. 605 making it an offense to sell liquor to an 'Indian,' which term is defined to include the aboriginal races, inhabiting Alaska when annexed to the United States, and their descendants of the whole or half blood 'who have not become citizens of the United States.'

The court also held, referring to the clause in article III of the Alaska treaty with Russia stipulating that the uncivilized native tribes of Alaska, 'will be subject to such laws and regulations as the United

States may from time to time adopt in regard to aboriginal tribes in that country;' 'there can be no doubt that this stipulation relates to the Indian tribes in Alaska, and manifestly the treaty was designed to insure them like treatment, under the laws and regulations of Congress, as should be accorded Indian tribes in the United States.'

It was argued in the Nagle case, supra, that because the Government has never treated the Indian tribes in Alaska, therefore it was not the intendment that general laws respecting Indians should extend to the Territory of Alaska. But the court said:

> 'It should be borne in mind, however, that it has long since been declared to be the policy of Congress not to treat further with the Indians as tribes. Act March 3, 1871, c. 120, 16 Stat. 544, 566. Ever since the passage of that act, Congress has governed the Indians by law, and not by treaty, and the policy affords cogent reason why general laws should apply to individual Indians in Alaska as well as elsewhere.'

It was held in the case of United States v. Cadzow (5 Alaska Reports 125), that the aboriginal tribes of Alaska have a right to occupy the public lands of the United States therein subject to the control of both the lands and the tribes by the United States; also that the uncivilized native tribes of Alaska are wards of the Government—the United States has the right, and it is its duty to protect the property rights of its Indian wards.

There are provisions in each of the following acts

designed to protect the Indians of Alaska in the use and occupancy of the lands held by them: Acts of May 17, 1884 (23 Stat. 24), and June 6, 1900 (31 Stat. 330), providing a civil government for Alaska; Act of March 3, 1891 (26 Stat. 1095), repealing timber culture laws and for other purposes, and act of May 14, 1898 (30 Stat. 412), extending the homestead laws and providing for right of way for railroads in the District of Alaska.

The act of May 17, 1906 (34 Stat. 197), is entitled 'An Act authorizing the Secretary of the Interior to allot homesteads to the natives of Alaska.' This act authorizes the Secretary of the Interior in his discretion to allot not to exceed 160 acres of non-mineral land 'to any Indian or Eskimo of either full or mixed blood who resides in and is a native of said District.' It was held in the case of Frank St. Clair (52 L.D. 597, 599-600):

> 'This is a special act relating to Alaska natives and is clearly separate and distinct from the act of May 14, 1898 (30 Stat. 409), extending the homestead land laws of the United States to the district of Alaska.'

The vacant and unappropriated lands in Alaska at the date of cession of 1867 by Russia became a part of the public domain of the United States; and the Indians of Alaska are wards of the Government and as such are entitled to the equal protection of the laws applicable to Indians within the limits of the United States. United States v. Berrigan (2 Alaska Reports 442); United States v. Cadzow (5 Alaska Reports

125). The natives of Alaska are wards of the Government and under its guardianship and care at least to such an extent as to bring them within the spirit if not within the exact letter of the laws relative to American Indians; their relations are very similar and in many respects identical with those which have long existed between the Government and the aboriginal peoples residing within the territorial limits of the United States (49 L.D. 592). The Indians and other 'natives' of Alaska are in the same category as the Indians of the United States; from an early date, pursuant to the legislative intent indicated by Congress, this department has consistently recognized and respected the rights of the Indians of Alaska in and to the lands occupied by them (50 L.D. 315; 51 L.D. 155); Alaska Pacific Fisheries v. United States (248 U. S. 78); Territory of Alaska v. Annette Island Packing Co. (289 Fed. 671).

The status of an applicant under the act of May 17, 1906, authorizing the Secretary of the Interior to allot homesteads to the natives of Alaska, is analogous to section 4 of the act of February 8, 1887 (24 Stat. 388), which provides that an Indian who has settled upon public lands of the United States shall be entitled to have the same allotted to him in the manner as provided by law for allotments to Indians residing upon reservations. This, of course, involves separation and living apart from the tribe. A reservation allottee is not required to reside upon or improve the land allotted to him. The court took the

position in the case of Nagle v. United States (191 Fed. 141), that said act, especially that section thereof which declares an Indian born within the Territorial limits of the United States who has taken up within said limits his residence separate and apart from the tribe to be a citizen, is in effect in Alaska.

The allotment to an Indian or Eskimo under the act of May 17, 1906, creates a particular reservation of the land for the allottee and his heirs, but the title remains in the United States, Charlie George et al. (44 L.D. 113), Worthen Lumber Mills v. Alaska Juneau Gold Mining Co. (229 Fed. 966).

See also 44 L.D. 113 and 48 L.D. 435.

The natives of Alaska do not for the most part live on reservations and very few have been created. However, the Attorney General and the courts have recognized that power exists to create Indian reservations as well as reservations for other public purposes. Alaska Pacific Fisheries v. United States (248 U. S. 78); United States v. Leathers (26 Fed. Cas. 897); and 17 Ops. Atty. Gen. 258.

The act of March 3, 1891 (26 Stat. 1095, 1101), authorizing the establishment of townsites in Alaska, the acquisition by individuals of limited areas for trade or manufacturing purposes, etc., expressly excepts 'any lands . . . to which the natives of Alaska have prior rights by virtue of actual occupation.' The act also set apart the Annette Islands as a reservation for the use of the Metlakahtla Indians who immi-

grated from British Columbia to Alaska, 'and such other Alaskan natives as may join them.' It has since been held that the reservation so created extends to and includes adjacent 'deep waters.' It was also held in that case—

> 'The reservation was not in the nature of a private grant but simply a setting apart until otherwise provided by law of designated public property for a recognized public purpose—that of safeguarding and advancing a dependent Indian people dwelling within the United States.' See United States v. Kagama (118 U. S. 375, 379, et seq.); United States v. Rickert (188 U. S. 432, 437).

The purpose of creating the reservation was to encourage, assist and protect the Indians in their effort to train themselves to habits of industry, become self-sustaining and advance to the ways of civilized life. True, the Metlakahtlans were foreign born, but the action of Congress has made that immaterial here.

And in the case of Territory v. Annette Island Packing Company (6 Alaska Reports 585, 601, 604)—

> 'While it may be true, as urged by counsel for the Territory that the Metlakahtlans residing on the reserve are not a tribe of Indians in the sense used in the Constitution of the United States, yet they are, and always have been, recognized as members of the Indian race, and the dealings of the Government with them have been as if they were a dependent people . . . These people, residing on a reservation established on their behalf by Congress, which they were authorized to use in common, subject to such re-

strictions and regulations as the Secretary of the Interior might make, took, in my view, a status politically analogous to that of native Indians on reservations within the United States, and hence became wards of the government. This view of the status of these people is borne out by the Supreme Court in Alaska-Pacific Fisheries v. United States, reported in 248 U. S. 78, 39 Supp. Ct. 40, 63 L. Ed. 138.'

The court also held in that case:

'The contract of lease between the Secretary of the Interior and the Annette Island Packing Company, together with its cannery, fish traps, and property used on the reservation under the lease, constitute and are an instrumentality of the United States, used by it in the performance of its duties to its Indian wards, and are not subject to taxation by the territory of Alaska. The attempt of the territory to levy and collect taxes on the said property or the packing company is ultra vires and void. Decree in favor of defendent and intervener and against the territory.'

See also Alaska Pacific Fisheries (240 Fed. 281); Territory of Alaska v. Annette Packing Company (289 Fed. 671).

By Executive order of February 27, 1915, the President 'Withdrew from disposal, and set apart for the use of the Bureau of Education, '25,000 acres, including both land and water, surrounding the village of Tyonek near the north end of Cook Inlet in Alaska. The primary object of the reservation was to enable the Department through the Bureau of Education to maintain a school and otherwise care for, support and advance the interests of the aboriginal

natives of the village mentioned whose main support was through hunting, trapping and fishing. The question was submitted by the officers of the Bureau of Education as to the authority for entering into a lease for the establishment of a salmon cannery at or near the village. In Solicitor's Opinion of May 18, 1923 (49 L.D. 592), it was held that such authority existed, reference being made to the similar case of the Metlakahtla Indians of Annette Islands where it was held that the Secretary of the Interior had the power to grant such a lease. Territory of Alaska v. Annette Islands Packing Company (289 Fed. 671). The Solicitor stated among other things:

> 'The fundamental consideration underlying this question is the fact that these natives are, in a very large sense at least, dependent subjects of our Government and in a state of tutelage; or in other words, they are wards of the Government and under its guardianship and care. The relations existing between them and the Government are very similar and in many respects identical with those which have long existed between the Government and the aboriginal peoples residing within the territorial limits of the United States.'

It was also held:

> 'By article III of the treaty of March 30, 1867, under which the Territory of Alaska was ceded to the United States, and by subsequent acts providing for their education and support, Congress has recognized the natives of Alaska as wards of the Federal Government, thus giving them a status similar to that of the American Indians within the territorial limits of the United States.

> 'While there is no specific statute relating to the subject, yet the inherent power conferred upon the Secretary of the Interior by section 441, Revised statutes, to supervise the public business relating to the Indians, includes the supervision over reservations in the Territory of Alaska created in the interest of the natives and the authority to lease lands therein for their benefit.'

The Solicitor's Opinion of March 12, 1924 (50 L.D. 315), had under consideration the status of the natives of Alaska with respect to the title to certain tide lands near Ketchikan. Reference was made in that connection to the provisions of the treaty of March 30, 1867, under which the Territory of Alaska was acquired by the United States as well as to the act of May 17, 1884 (23 Stat. 24), which virtually constitutes the organic act for the Territory of Alaska and which declares:

> 'That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress.' (Italics supplied.)

The act of March 3, 1891 (26 Stat. 1095), as previously stated, excepts 'any lands . . . to which the natives of Alaska have prior rights by virtue of actual occupancy.' The act of May 14, 1898 (36 Stat. 409), extended the homestead laws of the United States to the Territory of Alaska and authorized the Secretary of the Interior to reserve for use of the natives

of Alaska 'suitable tracts along the water front of any stream, inlet, bay or seashore, for landing places for canoes and other craft used by such natives.' Pursuant to this authority the Secretary on August 5, 1905, reserved the lands described as 'all the lands in the vicinity of the mouth of Ketchikan Creek which lie between the lands occupied by the natives and the limits of low tide of Tongass Narrows.'

It was held in the above Solicitor's Opinion that 'the tide or other lands occupied by or reserved for the Indians at Ketchikan, Alaska, can not be disposed of under existing law, but that power rests with Congress.'

It was also stated in that connection:

> 'From an early date, pursuant to the legislative intent indicated by Congress, this Department has consistently recognized and respected the rights of the natives of Alaska in and to the lands occupied by them. See 13 L.D. 120; 23 L.D. 335; 24 L.D. 312; 28 L.D. 427; 26 L.D. 517; 37 L. D. 334.'

See Solicitor's Opinion of May 27, 1925 (51 L.D. 155), relative to the power of the Territorial Legislature to impose a tax upon reindeer held or controlled by the natives of Alaska.

Reference was made to the case of Territory of Alaska v. Annette Island Packing Company (289 Fed. 671), which involved the question as to the authority of the Territory to tax the output of a salmon cannery under lease by the Secretary of the Interior to a packing company. It was held that the lease was

an instrumentality of the Government to assist the Metlakahtla Indians to become self-supporting and hence the Territory of Alaska could not collect such a tax from the corporation.

It was held in the case of Steamer Coquitlam v. United States (163 U. S. 346):

> ' . . . . Alaska is one of the Territories of the United States. It was so designated in that order and has always been so regarded. And the court established by the act of 1884 is the court of last resort within the limits of that Territory. It is, therefore, in every substantial sense the Supreme Court of that Territory . . . . '

Under authority of the act of March 3, 1891 (26 Stat. 826), the Supreme Court of the United States in execution of this law by an order promulgated May 11, 1891, assigned the Territory of Alaska to the Ninth Judicial Circuit.

From the foregoing it is clear that no distinction has been or can be made between the Indians and other natives of Alaska so far as the laws and relations of the United States are concerned whether the Eskimos and other natives are of Indian origin or not as they are all wards of the Nation and their status is in material respects similar to that of the Indians of the United States. It follows that the natives of Alaska, as referred to in the treaty of March 30, 1867, between the United States and Russia, are entitled to the benefits of and are subject to the general laws and regulations governing the Indians of the United States, including the citizenship act of

June 2, 1924 (43 Stat. 253), as Alaska has been held to be one of the Territories of the United States. Under the terms of Article III of the cession treaty of March 30, 1867, the civilized natives of Alaska have all along been citizens of the United States.

Very truly yours,
(Signed) E. C. FINNEY
Solicitor

Approved: February 24, 1932
(Signed) RAY LYMAN WILBUR
Secretary."